84-902

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WARDAIR CANADA INC.,

Appellant,

v.

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

APPENDIX

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Appendix A

Supreme Court of Florida

No. 64,036

DEPARTMENT OF REVENUE,
Appellant,

v.

WARDAIR CANADA, LTD.,
Appellee.

[June 14, 1984]

ADKINS J.

This case is before us on an order from the First District Court of Appeal certifying the issue in the case to be of great public importance. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const.

This case arose with the filing of a complaint in the circuit court in Leon County by Wardair Canada, Ltd. (hereinafter Wardair) challenging the constitutionality of chapter 83-3, Laws of Florida. The court consolidated this case with an action filed by Air Jamaica for the purpose of trial. The parties stipulated to a procedure whereby the airline was allowed to self-accrue the sales tax imposed under chapter 83-3 during the pendency of the proceedings subject to certain conditions. The circuit court entered an order of final judgment on July 19, 1983, separate from its order in the Air Jamaica case. The court upheld

the constitutionality of the law dismissing three of Wardair's counts in its complaint but ruled in favor of the airline in recognizing an exemption to the airlines to the motor fuel and special fuel tax imposed by the law by virtue of certain executive agreements with the United States. The trial judge had previously upheld chapter 83-3 in *Delta Airlines, Inc. v. Department of Revenue*, No. 83-761 (Leon County Cir. Ct.—Civ. Div. May 23, 1983). The Department of Revenue filed its notice of appeal from the trial court's final judgment on July 21, 1983. Shortly thereafter, Wardair filed its notice of cross-appeal. The First District Court of Appeal then certified the case to this Court.

This Court has ruled on three of the four issues raised by Wardair in its original complaint and on cross-appeal in its decision in *Delta Airlines, Inc. v. Department of Revenue*, No. 63,915, (Fla. June 14, 1984). The department has appealed the circuit court's ruling recognizing an exemption to the excise tax for the foreign airlines. The circuit court found that chapter 83-3 was inconsistent with a Non-scheduled Air Service Agreement between the United States and Canada, May 8, 1974, T.I.A.S. 7826.

The circuit court's order noted that article XII(1) of the Air Services Agreement exempts both the United States and Canada from national duties and charges on fuels and article XIV provides that neither party will discriminate against the other. The court then relied on its holding in *Lineas Aereas Costarricenses, S.A. v. Department of Revenue*, No. 83-761 (Fla. 2d Cir. June 21, 1983). In that case the court held that when the federal policy is to exampt foreign airlines from fuel taxes and prevent discrimination, the individual states are precluded from acting in that area.

The department argues that the agreement is inapplicable to estop the enforcement of chapter 83-3 for two reasons: 1) the agreement is not self-executing; and 2) the agreement specifically addresses only national customs, duties, excise taxes and charges with no application to or restriction on state taxation schemes. The circuit court did not expressly recognize a distinction between executory and non-executory agreement provisions in its order.

The department asserts that the following provisions in the agreement are executory and thus require an additional legislative enactment to effect implementation:

> Each Contracting Party shall exempt the carriers of the other Contracting Party to the fullest extent possible under its national law from import restrictions, customs duties, excise taxes, inspection fees, and other national duties and charges on fuel, lubricants, consumable technical supplies . . . and other items intended for use solely in connection with the operation, maintenance or servicing of aircraft of the carriers of the other Contracting Party. The exemptions granted by this paragraph shall apply to items:
>
> (a) introduced into the territory of one Contracting Party by or on behalf of the carriers of the other Contracting Party;
> (b) retained on board aircraft of the carriers of one Contracting Party upon arriving in or leaving the territory of the other Contracting Party;
> (c) taken on board aircraft of the carriers of one Contracting Party in the territory of the other Contracting Party and intended solely for use in international air services; whether or not such items are consumed wholly within the territory of the Contracting Party granting the exemption.

Because we agree with the department's conclusion that the agreement is inapplicable because it specifically

addresses only national customs, duties, and excise taxes and charges, we find it unnecessary to determine whether these provisions are executory or not. The Air Services Agreement is not a treaty ratified by the United States Senate. However, it is a formally executed international agreement and, as such, is valid and binding as if approved by act of Congress. *United States v. Pink*, 315 U.S. 203 (1941). The purpose of the agreement is obviously to preserve, protect and promote the continued development of a system of air transport free from discriminatory practices and to support equal commercial opportunity between the nations.

The doctrine of preemption which is given effect through the supremacy clause mandates that federal law overrides any state regulation where there is an actual conflict between the two sets of legislation such that both cannot validly stand. The United States Supreme Court has formulated analytical standards for preemption. In *Hines v. Davidowitz*, 312 U.S. 52 (1941), the Court construed the Federal Alien Registration Act of 1940 to override Pennsylvania's Alien Registration Act of 1939. The Court noted that if state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," federal regulation must preempt state regulation to give effect to the desired national policy. *Id.* at 67.

Fifteen years later the validity of a Pennsylvania state regulation was again before the Court in *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). The Court held that federal anticommunist legislation superseded the state's sedition act and enunciated a three-prong test to determine the supremacy of a federal regulatory scheme over state regulation in the same or similar area. The test involves an analysis of: 1) the pervasiveness of the federal regulatory

scheme; 2) federal occupation of the field as necessitated by the need for national uniformity; and 3) danger of conflict between state laws and the administration of the federal program.

The provisions in the agreement between the United States and Canada clearly express an intent to apply to only national taxes and duties. We do not believe that the scheme of this agreement is so pervasive so as to permit the reasonable inference that Congress intended to preclude the state's power to tax. Also, the competitive equality between the two nations would be destroyed if the United States air carriers had to pay state excise taxes on fuel purchases and the Canadian carrier did not.

We determined in our decision in *Delta Air Lines, Inc. v. Department of Revenue*, No. 63,915 (Fla. June 14, 1984), that the tax imposed by chapter 83-3 met the four-prong test of *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), and thus did not violate the commerce clause. In 1979, the United States Supreme Court decided the case of *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), setting forth two additional requirements to be met when foreign commerce is involved. The Court stated:

> [A]n inquiry more elaborate than that mandated by *Complete Auto* is necessary when a State seeks to tax the instrumentalities of foreign, rather than interstate commerce. In addition to answering the nexus, apportionment, and nondiscrimination questions posed in *Complete Auto*, a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second whether the tax prevents the Federal Government from "speaking with one voice when regulating commercial relations with foreign governments." If a state tax contravenes

> either of these precepts, it is unconstitutional under the Commerce Clause.

Id. at 451.

The trial court correctly found that the first requirement of *Japan Line* was not a concern because there had been no de facto showing of multiple taxation or substantial risk of the same. *Moorman Manufacturing Co. v. Blair*, 437 U.S. 267; *Shell Oil Co. v. State Board of Equalization*, 414 P.2d 820 (Cal. 1966).

For the reasons previously discussed, we also hold that the tax meets the second requirement of *Japan Line*. The agreement provides for efforts at exemption from national excise taxes, inspection fees and other national charges but does not provide for exemptions from state excise taxes. We must presume this has been done intentionally. We do not believe this legislation prevents our federal government from speaking with one voice.

Accordingly, we affirm the order of the circuit court as to the constitutionality of chapter 83-3 except that portion of the law pertaining to a tax credit for Florida corporations. In *Delta* we determined that portion to be unconstitutional and it was stricken from the law. We reverse the circuit court to the extent that it recognized an exemption for foreign airlines.

It is so ordered.

ALDERMAN, C.J., BOYD and SHAW, JJ., Concur
OVERTON, J., Dissents with an opinion in which McDonald, J., Concurs

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

OVERTON, J., dissenting.

I dissent. I find that the State of Florida has no authority to ignore valid air service agreements between the United States Government and the governments of other countries which exempt airlines based in participating nations from duties and charges on fuels. In my view, the individual states of this country are precluded by those agreements from taxing fuel used by foreign airlines. To accept the majority's view means that all United States airlines could, in turn, be subject to local government taxation on fuel in foreign countries. We are one country and our constitution requires us to speak with one voice when the federal government enters into agreements and treaties with foreign governments. *See* U.S. Const. art. I, § 8; art. VI. This state is precluded from enforcing this tax against this airline.

McDONALD, J., Concurs

Appendix B

Supreme Court of Florida

No. 63,915

DELTA AIR LINES INC.,
et al., Appellants,

v.

DEPARTMENT OF REVENUE,
Appellee.

[June 14, 1984]

ADKINS J.

This case is before us on an order from the First District Court of Appeal certifying the issue in the case to be of great public importance. We have jurisdiction. Art. V, § 3(B) (3), Fla. Const.

This case arose with the filing of a complaint by Delta Air Lines in the circuit court of Leon County seeking declaratory and injunctive relief from the enforcement of provisions of chapter 83-3, Laws of Florida, on the ground that the law was unconstitutional. Capitol Air, Inc., Northwest Airlines, Inc., Ozark Air Lines, Inc., Piedmont Aviation, Inc., Republic Airlines, Inc., The Flying Tiger Lines, Inc., United Airlines and USAir, Inc., were granted leave to intervene as party plaintiffs. On May 27, 1983, the circuit court entered its final judgment in favor of the Department of Revenue ruling the law constitutional. Delta appealed to the First District Court of Appeal which certified the case for immediate resolution by this Court.

We described the structure of chapter 83-3 and resolved some of the issues raised by Delta in our decision in *Eastern Air Lines v. Department of Revenue*, No. 63,949 (Fla. June 14, 1984). There are two issues which Delta raises which we were not faced with in that decision.

First, Delta raises the issue of whether chapter 83-3 violates the commerce clause of the United States Constitution by providing a corporate income tax credit for Florida-based airlines. Chapter 220, Florida Statutes (1981), imposes an income tax on domestic corporations and foreign corporations qualified to do business in Florida or actually doing business in Florida. Section 61 of chapter 83-3 creates section 220.189, Florida Statutes (1983), and provides a credit against the corporate income tax for air common carriers who have a corporate or business home office in Florida and also maintain a work force of more than 1200 employees in the state. This credit offsets up to one-half of the air carriers' fuel tax liabilities with a maximum credit of $5 million.

A state tax is not *per se* invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its own way. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). Taxes have been sustained against commerce clause challenges when the tax: 1) is applied to an activity with a substantial nexus with the taxing state; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services provided by the state. *Complete Auto*, 430 U.S. at 279. No state may, consistent

with the commerce clause, "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457 (1959). This principle follows from the basic purpose of the commerce clause which is to prohibit preferential trade areas destructive of the free commerce anticipated by the United States Constitution. *Boston Stock Exchange*, 429 U.S. at 329; *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951).

In *Boston Stock Exchange* the United States Supreme Court found unconstitutional a state stock transfer tax containing credit provisions which had the effect of discriminating against interstate commerce to the direct commercial advantage of local business. The transfer tax was imposed if any one of five events (sale, transfer, delivery, etc.) occurred within the state. The rate of tax was based upon the price of the security. The total tax was determined by the number of shares involved in the taxable event. The imposition of the tax itself was found to be constitutional. However, the credit structure of the tax was found to be unconstitutional. The credit amendments to the tax resulted in a scheme in which intrastate sales received a preferential fifty percent reduction in the rate of tax imposed and were given a maximum tax ceiling of $350. Out-of-state sales, however, were subject to the full tax rate without any ceiling. Because it imposed a greater tax liability on out-of-state sales than on in-state sales, the New York transfer tax fell "short of the substantially evenhanded treatment demanded by the [c]ommerce [c]lause." 429 U.S. at 332.

Another tax statute whose discriminatory credits and exemptions provided the basis for a finding of unconstitu-

tionality was the Louisiana statute reviewed in *Maryland v. Louisiana*, 451 U.S. 725 (1981). There, a tax was imposed on certain uses of natural gas coming into the state. The tax was imposed to equalize competition between locally produced gas subject to the state's severance tax and gas coming into the state from the outer continental shelf which was free of the severance tax. The use tax provided an exemption for gas consumed within the state. It also provided a tax credit against severance taxes for all use taxes paid, thereby encouraging investment in local mineral exploration and development and discouraging investment and development of the outer continental shelf and other states. The Court found the statute unconstitutional in light of the descriminatory effect produced by the pattern of credits and exemptions which violated the principle of equality. 451 U.S. at 759.

The circuit court here found that "the tax is on fuel purchased *in* the state and all consumers are taxed equally" and thus concluded that there is no burden on interstate commerce similar to that found in *Maryland v. Louisiana*. The court misconstrued the nature of the discrimination worked against interstate commerce by the corporate tax credit. The question is not one of whether Florida may impose this tax on fuel purchased in Florida for use in interstate commerce. Rather the issue is whether the tax with its attendant credit provision produces a discriminatory effect on interstate commerce. The credit provision of chapter 83-3 clearly discriminates against interstate commerce because the corporate tax credit provides a *direct commercial advantage* to Florida-based air common carriers over non-Florida-based carriers.

The circuit court also found *Boston Stock Exchange* inapplicable stating that, in the present case, "the legisla-

ture is not trying to tax any out-of-state transactions." The circuit court misconstrued the holding in *Boston Stock Exchange*. The United States Supreme Court in *Boston Stock Exchange* was not concerned with whether the transaction occurred in New York or outside the state, but whether the credit structure of the tax favored in-state business and discriminated against interstate commerce.

The circuit court also relied on *Archer Daniels Midland Co. v. State*, 315 N.W.2d 597 (Minn. 1982). In *Archer Daniels* the Supreme Court of Minnesota struck down a tax credit statute similar to the Florida-based tax credit provided in chapter 83-3. Minnesota imposed an excise tax of thirteen cents per gallon on all gasoline sold in the state including gasohol. The taxing statute was amended in 1980 to provide a four cents per gallon partial exemption for gasohol made from Minnesota farm products and blended with alcohol distilled in Minnesota. A non-resident alcohol producer challenged the constitutionality of this statute alleging that the higher taxes imposed on non-resident producers discriminated against interstate commerce. The court found that the exemption violated the commerce clause noting that the act attempted to unfairly preserve local markets for local interests by conferring an artificial economic advantage to local interests under the state's taxing power. *Id.* at 599. The circuit court ruled that *Archer Daniels* dealt with out-of-state production or consumption and that chapter 83-3 in no way affects out-of-state production or consumption. This approach again overlooks the real issue in this case. Just as the Minnesota statute favored in-state gasohol producers, chapter 83-3 confers an artificial economic advantage on those interstate air carriers who maintain corporate or business home offices in Florida over those competing air carriers who base their corporate headquarters outside the state.

The circuit court continued its erroneous analysis under the commerce clause by referring to *Faircloth v. Mr. Boston Distiller Corporation*, 245 So.2d 240 (Fla. 1970), as supporting the proposition that this Court has upheld special tax exemptions to encourage Florida industry. The court's reliance on *Faircloth* is misplaced because that case involved a challenge to a state excise tax based upon equal protection and due process arguments. The commerce clause was not an issue in that case.

The circuit court has misconstrued the analysis necessary to determine whether a statute discriminates against interstate commerce. The test under the commerce clause is, as we have noted, whether the statute discriminates against interstate commerce by providing a direct commercial advantage to local commerce. The corporate income tax credit provides a direct commercial advantage to select Florida-based air carriers and thereby violates the commerce clause.

In *Eastern*, No. 63,949 (Fla. June 14, 1984), we discussed the proper analysis to determine whether a statutory provision was severable from the remainder of the statute. We find that the corporate tax credit provision, now section 220,189 (Florida Statutes 1983), can be logically separated from the remaining valid provisions of chapter 83-3 without hampering the legislature's intent to provide a transportation fund for the state. Thus, we strike that provision which extends a corporate income tax credit to Florida-based air carriers. We believe this will still accomplish the legislature's primary purpose—to tax corporations qualified to do business in Florida or actually doing business in Florida.

Delta also challenges section 6 of the law as being a road-user tax totally unrelated to the services provided

by the state and thus violative of the commerce clause. Delta states in its brief that the first gas tax and the corresponding first four cents of the special fuel tax formerly imposed under chapter 206, Florida Statutes (1981), levied an *excise* tax specifically on road-users. Delta also refers to the new provision as "the new sales tax." However, the thrust of Delta's agrument is that this tax is a *user* tax and, as such, fails the fourth prong of the text enunciated in *Complete Auto*. Delta argues that it and other interstate air common carriers do not use the roads in Florida and, therefore, the measure of the tax bears no relationship to Delta's presence or activities in the state.

We must disagree with Delta's argument. First, the tax is not a road-user tax. It is an excise tax imposed under part II of chapter 212, which is commonly referred to as the sales tax law of the state of Florida. The tax is imposed on the privilege of engaging in certain businesses, including the selling of motor fuels and special fuels in the state. *All purchasers* of motor fuel or special fuel are taxed on the incident of first withdrawal. The funds generated are to be deposited in a state transportation fund and are not, as Delta has asserted, to be restricted to only road use.

Our interpretation of this statute as an excise tax is consistent with prior United States Supreme Court decisions which reviewed similar statutes dealing with taxes on fuel used by airlines.

In 1933 the United States Supreme Court was faced with a challenge to a Tennessee statute which imposed an excise tax on the privilege of selling, storing, or distributing gasoline within the state. *Nashville, Chattanooga, & St. Louis Railway v. Wallace*, 288 U.S. 249 (1933). The proceeds of the tax were to be used solely in the construc-

tion and maintenance of a highway system in the state. The appellant rail carrier contended that the tax was in effect a tax upon the use of the gasoline in appellant's business as an interstate carrier and, thus, an unconstitutional burden on interstate commerce. *Id.* at 737. The court noted that gasoline having come to rest in storage is taxable by the state, notwithstanding its prospective *use* as an instrument of interstate commerce, much the same as a right of way, rolling stock, or other instruments of interstate commerce are subject to local property taxes. Accordingly, the Court stated:

> [T]here can be no valid objection to the taxation of the exercise of any right or power incident to appellant's ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson v. Kentucky*, supra. Here the tax is imposed on the successive exercise of two of those powers, the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations. . . .
>
> . . . [T]he levy is a tax, not a toll or charge for use of the highways. . . .

Id. at 268.

In *Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U.S. 147 (1931), the Supreme Court upheld a state tax on the sale of gasoline within the state. The suit was brought by an interstate air carrier which argued that the tax placed a direct burden on interstate commerce. The Court found that the tax, which was described in the statute as a license tax, was for the privilege

of carrying on the business of selling gasoline. The Court emphasized that under the circumstances the validity of the tax would not be affected by whether the tax was construed to be an excise tax or a property tax. The Court stated:

> There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected.

Id. at 153.

Similarly, the Court upheld a Wyoming law which taxed all gasoline "used or sold" in the state and applied to all gasoline imported for use upon its withdrawal from storage tanks in *Edelman v. Boeing Air Transport, Inc.*, 289 U.S. 249 (1932). The Court described the tax in the following manner:

> The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline consumed in respondent's planes either on coming into the State or on going out. It is at the time of withdrawal alone that "use" is measured for the purposes of the tax. The stored gasoline is deemed to be "used" within the State and therefore subject to the tax, when it is withdrawn from the tanks. . . .
>
> A State may validly tax the "use" to which gasoline is put in withdrawing it from storage within the State, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. Such a tax cannot be distinguished from that considered and upheld in *Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace*, supra. There it was pointed out that "there can be no valid objection to the taxation of the exercise of any right or power incident to . . . ownership of the gasoline which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in Helson v. Kentucky, 279 U.S. 245, 73 L. ed. 683, 49 S. Ct. 279." As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations.

Id. at 252 (emphasis supplied).

The Supreme Court of the United States has stated that the constitutional power of a state to tax does not depend upon the enjoyment of the taxpayer of any special benefit from the use of the funds raised by taxation. *Nashville, Chattanooga & St. Louis Railway v. Wallace*, 288 U.S. 249, 269 (1933). A state is free to pursue its own fiscal policies, "if by the practical operation of a tax the state has exerted power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940). *See also Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 625 (1981); *General Motors Corp. v. Washington*, 377 U.S. 436, 440–41 (1964). The relevant inquiry under the fourth prong of the *Complete Auto* test is not, as Delta seems to suggest, the *amount* of the tax or the *value* of the benefits allegedly bestowed as measured by the costs the state incurs on account of the taxpayer's activities. *Commonwealth Edison*, 453 U.S. at 625. The

first prong of *Complete Auto* clearly requires that the interstate business (here the airlines) have a substantial nexus with the state before *any* tax may be levied on it. The fourth prong of the test is intended to impose the additional limitation that the measure of the tax be reasonably related to the extent of the contact. *Id.* at 626; *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938).

This tax is unlike a true "user fee" or user tax. Perhaps the best illustration of a true user tax is found in *Evansville-Vanderburgh Airport Authority v. Delta Air Lines, Inc.*, 405 U.S. 707 (1972). In *Evansville-Vanderburgh* the United States Supreme Court reviewed a use tax imposed on airlines by an Indiana municipality. All interstate air carriers were charged a user service charge for each enplaning passenger. The monies collected were to defray the cost of airport construction and maintenance. The tax was upheld and found to be fairly related to the use of the facilities by the airlines.

The present tax is more analogous to that found in *Commonwealth Edison* where the United States Supreme Court upheld a Montana severance tax on coal. Coal producers challenged the tax contending that the severance tax had a discriminatory effect on interstate commerce since ninety percent of Montana's coal was shipped out-of-state and, therefore, the tax burden was borne primarily by out-of-state consumers. The Court found that the coal producers' claim hinged on an inquiry into the fourth prong of *Complete Auto*. First, the Court concluded that, contrary to appellant's contention, the severance tax was a general revenue tax. 453 U.S. at 621. The Court also concluded that the fourth prong of *Complete Auto* was satisfied by the Montana tax. The Court stated:

> Because it is measured as a percentage of the value of the coal taken, the Montana tax is in "proper proportion" to appellants' activities within the State and, therefore, to their "consequent enjoyment of the opportunities and protections which the State has afforded" in connection with those activities.

Id. at 626 (citing *General Motors Corp. v. Washington*, 377 U.S. at 440–41).

We believe the imposition of this excise tax on the *purchase* of motor fuel and special fuel in the state of Florida is fairly related to those purchasers' enjoyment of the protections and benefits afforded by the state and the privilege of doing business in an organized society. Delta operates in at least nine of the major airports throughout the state of Florida transporting persons and property and engaging in the business of operating a commercial airline for profit. The persons and property which are transported through the air by airlines such as Delta do not come to rest at the airports. Those persons and any property generally must then use the public roads and highways of the state in automobiles or trucks or some other means of public transportation. We must disagree with Delta's contention that the tax is invalid because it is not fairly related to the services provided by the state.

Accordingly, we affirm that portion of the circuit court's order which upheld section 6 of the law as not being violative of the commerce clause. But, we reverse the circuit court's order insofar as it upheld the corporate tax credit to Florida-based airlines and strike that section of chapter 83-3.

It is so ordered.

ALDERMAN, C.J., BOYD, OVERTON, McDONALD and SHAW, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Appendix C

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 83-1106

WARDAIR CANADA (1975), LTD.
A Corporation organized and existing under the Laws of Canada,

Plaintiff,

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Defendant.

FINAL JUDGMENT

This cause is before the Court on final hearing on the pleadings, evidence and arguments of counsel for the respective parties and on the briefs of counsel for the parties, and the Court having considered all of same and being otherwise advised in the premises, it is

ORDERED AND ADJUDGED:

1. The Plaintiff asserts that Senate Bill No. 8A, Chapter 83-3, Laws of Florida, titled "an act relating to transportation finance and administration":

COUNT I: violates the Commerce Clause of the United States Constitution,

COUNT II: violates the Equal Protection clauses of the United States Constitution and the Constitution of the State of Florida,

COUNT III: violates Article III, Sections 10 and 11 of the Constitution of the State of Florida and is a special law,

COUNT IV: is inconsistent with Non-scheduled Air Services Agreement between the United States and Canada, May 8, 1974, T.I.A.S. 7826.

2. Wardair is certified by the United States Civil Aeronautics Board Order 80-8-97, July 18, 1980, Docket 27817, effective August 18, 1980.

3. The preamble to the Air Services Agreement, T.I.A.S. 7826, states that in recognition of the geographic situation of Canada and the United States the relationship between the two peoples creates a unique international civil aviation situation. To ensure "the continued development of a system of air transport free from discriminatory practices, based on an equitable exchange of economic benefits to the two countries: this agreement was reached between the two countries "to accommodate the needs of the people of the two countries with a minimum of artificial restraint". Article XII(1) exempts the parties from national duties and charges on fuel. Article XIV provides that neither party will discriminate against the other. These provisions read together illustrate a federal policy designed to encourage free and unencumbered air transportation between the United States and Canada. As this Court held in *Lineas Aereas Costarricenses, S.A. v. Department of Revenue*, Case No. 83-761 (2d Cir. Fla. June 1, 1983) when the federal policy is to exempt foreign airlines from fuel taxes and prevent any discrimination so as to further the free flow of international aviation, the

individual states are precluded from acting in this area and from preventing the United States from "speaking with one voice", which is an inquiry which must be made pursuant to *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), when dealing with foreign commerce restrictions. For the reasons stated in the *Lineas Aereas Costarricenses*, supra, decision and because the language of this Air Transport Services Agreement is basically the same as the Agreements in that decision, this Court finds Senate Bill 8A inconsistent with the undertakings of the United States government in international bilateral agreements designed to establish federal uniformity and prevent retaliatory taxes on U.S. carriers.

4. The allegations in Courts I, II, and III were disposed of in this Court's decision in *Delta Air Lines, Inc. v. State of Florida, Department of Revenue*, Case No. 83-761 (2d Cir. Fla. May 23, 1983) and these allegations are likewise disposed in this case, finding them without merit.

ACCORDINGLY, IT IS FURTHER ORDERED AND ADJUDGED:

A. This Court finds and determines that Chapter 83-3, Laws of Florida, also referred to as Senate Bill 8A, is a valid enactment and is not in conflict with the Equal Protection clauses of the United States Constitution (14th Amendment) nor the Florida Constitution (Article I, Section 2) nor with the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3) for the reasons stated in *Delta Airlines*, supra.

B. It is further found that Senate Bill 8A is inconsistent with the undertakings of the United States government in international bilateral agreement with Canada, T.I.A.S. 7826.

C. Plaintiff's Counts I, II, and III are hereby finally dismissed.

D. Plaintiff's Count IV is found to be meritorious and Plaintiff is here granted a permanent injunction against Defendant Department of Revenue from assessing and collecting fuel taxes pursuant to Senate Bill 8A.

E. This Court upholds the constitutionality of Senate Bill 8A, but recognizes an exemption from the fuel tax for Plaintiff foreign airlines who entered an executive agreement with the United States prior to the enactment of this Bill.

DONE AND ORDERED, at Tallahassee, Leon County, Florida, this 19th day of July, 1983.

BEN C. WILLIS, Circuit Judge

Appendix D

IN THE SECOND CIRCUIT COURT IN AND FOR LEON COUNTY, FLORIDA

CASE NO: 83-964

LINEAS AEREAS COSTARRICENSES, S.A.,
a Costa Rican Corporation,
Plaintiff

vs.

STATE OF FLORIDA,
DEPARTMENT OF REVENUE
Defendant.

FINAL JUDGMENT

This cause is before the Court on final hearing on the pleadings, evidence and arguments of counsel for the respective parties and the intervenors, and on the briefs of counsel for the parties, and the Court having considered all of same and being otherwise advised in the premises, it is

ORDERED AND ADJUDGED:

1. The Plaintiff asserts that Senate Bill No. 8-A, Chapter 83-3, Laws of Florida, title "an act relating to transportation finance and administration":

COUNT I: discriminates against foreign airlines in violation of Congress' exclusive power over foreign com-

merce, pursuant to Article I, Section 8, Clause 3 of the United States Constitution,

COUNT II: is inconsistent with the Air Transport Services Agreements lawfully entered into by the President of the United States.

COUNT III: denies foreign airlines equal protection of the laws under the United States Constitution.

COUNT IV: violates Article I, Section 9, of the Florida Constitution because there is no reasonable relationship between the taxes imposed and the services provided to foreign airlines, and

COUNT V: is a special law in violation of Sections 10 and 11 of Article III of the Constitution of the State of Florida.

Plaintiff prays for a permanent injunction to prevent Defendant Department of Revenue (DOR) from assessing and collecting fuel taxes pursuant to Senate Bill 8-A.

2. In light of this Court's recent decision in *Delta Air Lines, Inc. v. State of Florida, Department of Revenue*, Case No. 83-761, (Leon County Circuit Court—Civil Division, May 23, 1983), the assertion in Counts I, III, IV, and IV are without merit. However, the Court finds merit in the assertion in Count II and hereby grants a permanent injunction for the reasons subsequently discussed. This Court upholds the constitutionality of Senate Bill 8-A but recognizes an exemption for foreign airlines based on the bilateral agreements entered into between the federal government and Plaintiffs and intervenors in this case.[1]

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[1] Commercial Air Transport Agreement, January 8, 1947, United States—Ecuador, T.I.A.S. 1606; Aviation Transport Services Agreement, October 24, 1956, United States--Colombia, T.I.A.S. 5338; Air Transport Services Agreement, April 13, 1953, United States—Venezuela, T.I.A.S. 2813; Air Transport Services Agreement, August 15, 1960, United States—Mexico, T.I.A.S. 4675; Air Transport Services Agreement, May 10, 1947, United States—Chile, T.I.A.S. 1905; Air Transport Services Agreement, September 22, 1977 United States—Argentina, T.I.A.S. 978; Air Transport Services Agreement, February 11, 1946, United States—United Kingdom, T.I.A.S. 1507; Aviation Agreement, November 22, 1961, United States—United Kingdom, T.I.A.S. 4955; Memorandum of Consultations, April 25, 1982, United States—Brazil: Memorandum of Understanding, August 17, 1979.

DISCUSSION

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, vests with Congress the exclusive power to regulate foreign commerce. The Supremacy Clause, Article 4, Section 2, states that the Constitution and the laws made pursuant thereto are the supreme law of the land. Therefore, when Congress traditionally regulates in a certain area such as in the present case by extending reciprocal agreements to foreign airlines to "strengthen even more the cultural welfare and economic bonds . . . and ensure continued development in the common welfare on bases of equality and reciprocity", Air Transport Services Agreement with Mexico, p. 1, the states are preempted or superseded from acting in this area. Further, Congress has extended federal tax exemption from custom duties, inspection fees, excise taxes, and other national duties or charges to foreign airlines "in order to prevent discriminatory practices and to assure equality of treatment." Air Transport Services Agree-

ment with Mexico, Article 7,[2] and that the respective authorities will attempt to facilitate maximum efficiency "with a fair and equal opportunity" for the airlines to operate on the designated routes. Mexico Agreement, Aritcle 8.[3]

Defendant contends that the "fair and equal opportunity" refers only to routes and does not affect excise tax imposition. Fuel is an essential factor in an airlines' operation, and if its price is increased, the cost to fly to a specific destination in likewise increased. This will adversely affect the economic feasibility of flying to that destination. The foreign airlines involved in this suit fly only between their country and specified cities in the United States. In Florida that city is Miami. They engage in no intrastate or interstate flights, but are confined to flights between their country and the specific city. If a particular state imposes a substantial increase in the cost of flying to a certain city, it is only logical that this disadvantage would inhibit the airlines' desire to continue flying to that city. Therefore, tax imposition does substantially affect the

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[2]Similar or equal provisions appear in the Air Transport Services Agreements listed in footnote 1 as follows: Venezuela Agreement—Article 4; Chile Agreement—Article 3; Ecuador Agreement—Article 3; United Kingdom Agreement—Article 3; Costa Rica Memorandum—Article 9; Brazil Agreement—Article 9; Colombia Agreement—Article 7; Argentina Agreement—Section 2(F).

[3]Similar or equal provisions appear in the Air Transport Services Agreements listed in footnote 1 as follows: Venezuela Agreement—Annex IV(b); Chile Agreement—Annex A.A; Ecuador Agreement—Annex Section 1.A; Costa Rica Memorandum—Article 9(5), Brazil Memorandum—Section IX. Colombia Agreement—Article 8; Argentina Agreement—Section 2(F).

established route and denies the airlines a fair and equal opportunity to serve that route.

It is noteworthy that in the Argentina Agreement, Section 2(F)(3), the wording is that the civil aeronautics authorities will endeavor to ensure "exemption from taxes", without specifying exemption only from national taxes. Most of the agreements specify the referral is to national taxes and Defendant emphasizes this point in its brief as indicating Congress intentionally did not exempt state or local taxes. Consistent with this reasoning, however, Argentina could submit that the failure to specify would imply the federal government would make efforts to ensure exemption from all taxes—state, local, etc. In fact, the memorandum agreement with Costa Rica, Article 9(5) does in fact state that "each party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities".

In arguing that Congress' failure to specifically exempt state taxes in the majority of the agreements, Defendant cites *Finland v. Town of Pelham*, 290 N.Y.S.2d (1966), to demonstrate an express statement of Congress in a treaty as compared to the non-express statements in the present agreements. However, it cannot be concluded that whenever Congress does not speak to an issue that the intent is to affirm state regulation in that area by negative implication. Congress cannot be expected to speak to all aspects of a given situation. The United States Supreme Court spoke directly on this situation in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979):

> "The premise of Appellees' argument is that a State is free to impose demonstrable burdens on commerce, so long as Congress has not preempted

> the field by affirmative regulation. But it long has been 'accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.' " *Southern Pacific Company v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945).

Similarly, Defendant argues that the agreements between the United States and Costa Rica, Brazil, Trinidad and Tobago, and Honduras are executory and require affirmative legislative action to validate them. *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979). The court in Postal states at page 875:

> "it was early decided that treaties affect the municipal law of the United States only when those treaties are given effect by congressional legislation or are, by their nature, self-executing."

but goes on to say at page 876:

> "The question whether a treaty is self-executing is a matter of interpretation for courts when the issue presents itself in litigation . . . and, as in the case of all matters of interpretation, the court's attempt to discern the intent of the parties to the agreement so as to carry out their manifest purpose."

The agreements involved here have no express language that further legislation is necessary, and because, as will be discussed, the federal government recognizes these agreements as effective, this court discredits any argument that these agreements are ineffective because further legislative action is needed. As Plaintiff informs the Court, the challenged agreements are in effect pending exchange of ratification, and the Civil Aeronautics Board

recognizes these agreements as effective by having granted Foreign Air Carrier Permits to Costa Rica and by recognizing the validity of the Brazil agreement in decisions. The T.I.A.S. agreements 1507, 4955, and 5209 govern air transportation with Trinidad and Tobago, such agreements made between the United Kingdon and United States. Although no T.I.A.S. agreement exists for Honduras, TAN, the national carrier, has been authorized by the Civil Aeronautics Board C.A.B. Order 82-6-98 (June, 1982). Even if there were a valid distinction between the effectiveness of an executory agreement as opposed to an executed agreement, the Court here is examining the federal *policy* considerations behind the agreements and these considerations strongly indicate lenient tax burdens on foreign carriers. The agreements, executory or executed, are evidence of this policy as the Supreme Court stated in *United States v. Pink*, 315 U.S. 203, 231 (1941) as "superior Federal policy evidenced by a treaty or international compact or agreement."

Defendant argues in its brief that Plaintiff is trying to elevate the agreements to the status of treaties and appears to discredit this elevation; yet Defendant's cites involve treaties which implies Defendant's recognition of that status. *Pink* appears to treat international agreements with the same to status of treaties, so the distinction is irrelevant.

Regarding the non-express language in the agreements, Defendant cites *Guarantee Trust Co. v. United States*, 304 U.S. 126, 143 (1938):

> "Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them."

In the present case, it seems to be the state who is trying to override the privileges extended to foreign carriers by

the federal government, not vice versa. All the bilateral agreements were in effect before Senate Bill 8-A, dating back to 1947 (Ecuador), 1948 (Chile), 1953 (Venezuela) etc. This would seem to indicate that the federal government had established their policy of reciprocal tax exemptions before the State acted. It is, therefore, the state who is impairing a federal right, not vice versa. Defendant also cites *United States v. Pink* at 230:

> "It is of course true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy."

However, *Pink* goes on to say at p. 231:

> "But state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international agreement."

Using the *Pink* analysis, derogation from the State's authority in this case is in fact necessary because the apparent policy expressed in the bilateral agreements is for reciprocal tax advantages. This precludes the state from acting in a manner to "frustrate the achievements of federal uniformity." *Japan Line*, p. 450. The federal concern for equal commercial opportunity between nations supports the policy of Congress to exempt foreign airlines from excise taxes.

The Supreme Court of the United States in *United States v. Belmont*, 301 U.S. 324,331 (1947), has rather clearly stated the applicable principle as follows:

> "in the case of all international compacts and agreements . . . that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states."

The test to be used when a state attempts to regulate foreign commerce was articulated in *Japan Line*, page 451:

> "an inquiry more elaborate than that mandated by *Complete Auto* is necessary when a State seeks to tax the instrumentalities of foreign, rather than of interstate, commerce. In addition to answering the nexus, apportionment, and nondiscrimination questions posed in *Complete Auto*, a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and second, whether the tax prevents the Federal Government from 'speaking with one voice' when regulating commercial relations with foreign governments."

The first requirement is not a concern in the present case because there has been no de facto showing of multiple taxation, and, as the court stated in *Moorman Manufacturing v. Bair*, 437 U.S. 267 (1978), the court will not invalidate a statute where the risk of multiple taxation is merely "speculative." It is the second requirement which concerns the court in the present case. It is not overlooked that in *Japan Line* the tax was an ad valorem levy on certain containers used in seagoing vessels of Japan, whereas in this case the tax is upon the withdrawing of expendable fuel from storage. However, the principle of both seems applicable. The levy on the fuel, which is a sine qua non to movement of the aircraft, seems to be within the class of burdens which the international agreements seek to prevent.

The United States, consisting of fifty individual state governments united under one flag, must present a united front when dealing in economic affairs with other nations. Over the years the federal government has negotiated these bilateral agreements to prevent price discrimina-

tion toward U. S. carriers in other nations, these being reciprocal agreements. There have been continuing efforts of the Civil Aeronautics Board to eliminate fuel taxes imposed by other nations.[4] Also, in 1974 Congress enacted the International Air Transportation Fair Competitive Practices Act, 88 Stat. 2102, to protect U.S. carriers from discrimination. By allowing the fifty states to impose individual state taxes, it would thwart the purpose of these federal efforts and infringe on the federal power to regulate foreign commerce.

Concern for Florida's fuel tax was expressed by the United States Department of State in a letter to the Florida Department of Revenue on September 29, 1982 from Matthew V. Scocozza, Deputy Assistant Secretary of State for Transportation and Telecommunication. This letter stated that the United States afforded an exemption from federal taxes and this if individual states imposed taxes it would "frustrate the international system of reciprocal tax exemptions and thereby significantly increase the cost of international air transportation. After reassurances from the Florida DOR in their letter of October 25, 1982, that airlines continued to enjoy "generous tax advantages", Senate Bill 8-A was enacted. The Department of State reacted by sending their letter of March 17, 1982 (date is a typographical error and should read "1983") that the Department was "surprised and distressed" to hear of the changes in the Florida fuel tax

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[4]Civil Aeronautics Board ("CAB"). Fiscal Year ("FY") 1982/1981 Report to Congress at 94–96; CAB, FY 1980 Report to Congress at 84; CAB, FY 1979 Report to Congress at 103; CAB, FY 1978 Report to Congress at 96; CAB, FY 1977 and Transition Quarter Report to Congress at 106–109, 114–115; CAB, FY 1976 Report to Congress at 103–104.

as applied to airlines. Mr. Scocozza's first letter spoke of a "generally-accepted and long-standing international practice of reciprocally exempting such items from taxes".

In *Japan Line* at page 448 the Court talks of state taxes in reference to the second "national-uniformity" requirement:

> "a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential. Foreign commerce is pre-eminently a matter of national concern."

At page 449 of *Japan Line* the Court cites *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976) as follows:

> "the Federal Government must speak with one voice when regulating commercial relations with foreign governments."

The *Japan Line* court then discusses several ways a state tax may "frustrate the achievements of federal uniformity", page 450. Among these concerns are asymmetry in international tax structure and retaliatory taxes against American-owned instrumentalities present in other nations:

> "Such retaliation of necessity would be directed at American Transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer." Page 430.

ACCORDINGLY, IT IS FURTHER ORDERED AND ADJUDGED:

A. This Court finds and determines that Chapter 83-3, Laws of Florida, also referred to as Senate Bill 8-A, is a valid enactment and is not in conflict with the Equal Protection clauses of the United States Constitution (14th Amendment) nor the Florida Constitution (Article I, Sec-

tion 2); nor with the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3) for the Reasons stated in *Delta Air Lines, Inc. v. State of Florida, Department of Revenue*, Case No. 83-761 (Leon County Circuit Court—Civil Division, May 23, 1983).

B. It is further found that Senate Bill 8-A is inconsistent with the undertakings of the United States government in international bilateral agreements with Plaintiff and intervenor foreign airlines.

C. Plaintiff's Counts I, II, IV, and V are hereby dismissed finally.

D. Plaintiff and Intervenors are granted a permanent injunction against Defendant DOR assessing and collecting fuel taxes pursuant to Senate Bill 8-A. Count II of Plaintiff's Complaint is meritorious.

E. This court upholds the constitutionality of Senate Bill 8-A, but recognizes an exemption from the fuel tax for Plaintiff and Intervenor foreign airlines who have entered executive agreements with the United States prior to the enactment of this Bill.

DONE AND ORDERED, at Tallahassee, Leon County, Florida, this 1st day of June, 1983.

BEN C. WILLIS,
Circuit Judge

Appendix E

Mandate

Supreme Court of Florida

To the Honorable, the Judges of the Circuit Court in and for Leon County, Florida

WHEREAS, in that certain cause filed in this Court styled:

DEPARTMENT OF REVENUE v. WARDAIR CANADA, LTD.

Case No. 64,036

Your Case No. 83-1106

The attached opinion was rendered on June 14, 1984,

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Joseph A. Boyd, Jr.

Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 12th day of September, 1984.

Clerk of the Supreme Court of Florida.

IN THE SUPREME COURT OF FLORIDA
WEDNESDAY, SEPTEMBER 12, 1984

DEPARTMENT OF REVENUE,	**	
Appellant,	**	CASE NO. 64,036
vs.	**	Circuit Court Case No. 83-1106 (Leon)
WARDAIR CANADA, LTD.,	**	
Appellee.	**	

On consideration of the motion for rehearing filed by attorneys for appellee, and response thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

BOYD, C.J., ADKINS, OVERTON, ALDERMAN, McDONALD and SHAW, JJ., Concur

BY /s/_____
DUBLIN CAUSSEAUX
Deputy Clerk

Appendix F

FILED
SID J. WHITE
Nov. 15, 1984
Clerk, Supreme Court

IN THE
Supreme Court of Florida

Case No. 64,036

STATE OF FLORIDA,
DEPARTMENT OF REVENUE
Appellant,
v.
WARDAIR CANADA (1975), LTD.,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Wardair Canada Inc.[1] the appellee in this Case No. 64,036, hereby appeals to the Supreme Court of the United States from the entire final judgment of the Supreme Court of Florida entered in this

[1] Appellee in the above styled proceeding, Wardair Canada (1975), Ltd., changed its corporated name to its present one, Wardair Canada Inc., and that corporate name change has been approved by the Civil Aeronautics Board, CAB Order 83-12-54.

action on June 14, 1984 (motion for rehearing denied by the Supreme Court of the State of Florida on September 12, 1984), except that part reversing the order of the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, which upheld the corporate tax credit to Florida based airlines and striking that section of Chapter 83-3, Law of Florida.

This appeal is taken pursuant to 28 U.S.C. section 1257(2).

Respectfully submitted,

WALTER D. HANSEN
BURWELL, HANSEN, MANLEY & PETERS
1706 New Hampshire Avenue, N.W.
Washington, D. C. 20009
(202) 745-0441
Attorney for Appellee

Dated: November 13, 1984

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 1984, copies of this Notice of Appeal were served on all parties required to be served by first class mail, postage prepaid, and properly addressed as follows:

Larry Levy
General Counsel
Department of Revenue
State of Florida
Room 203
Carlton Building
Tallahassee, Florida 32301

I further certify that on this 13th day of November, 1984, copies of this Notice of Appeal were served on the court possessed of the record, the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, by first class mail, postage prepaid and properly addressed as follows:

Clerk of Circuit Court
Circuit Court of the Second Judicial Circuit
In and For Leon County
P.O. Box 726
301 S. Monroe Street
Tallahassee, Florida 32302

WALTER D. HANSEN

Appendix G

Senate Bill No. 8-A

A bill to be entitled An act relating to transportation finance and administration; adding subsections (21) and (22) to s. 212.02, Florida Statutes, 1982 Supplement; amending s. 212.05(1), Florida Statutes, 1982 Supplement, and adding subsection (4); amending s. 212.055(1), Florida Statutes, as amended; amending ss. 125.0165(1) and 212.08(4), Florida Statutes, 1982 Supplement; creating part II of chapter 212, Florida Statutes; providing for the imposition of the tax on sales, use, and other transactions on the sale of motor and special fuels; providing that provisions which provide for the taxation of fuels used by certain vehicles licensed as common carriers, and vessels, engaged in interstate or foreign commerce on the basis of the ratio of intrastate to interstate mileage do not apply to aircraft. . . .

* * *

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (21) and (22) are added to section 212.02, Florida Statutes, 1982 Supplement, to read:

212.02 [FLA. STAT. ANN. §212.02 (West Supp. 1984)] Definitions.—The following terms and phrases when used in this chapter shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

(21) "Motor fuel" means and includes what is commonly known and sold as gasoline and fuels containing a mixture of gasoline and other products.

(22) "Special fuel" means any liquid product, gas product, or combination thereof used in an internal combustion engine or motor to propel any form of vehicle, machine, or mechanical contrivance. This term shall include, but not be limited to, all forms of fuel commonly or commercially known or sold as diesel fuel, kerosene, butane gas, or propane gas, and all other forms of liquefied petroleum gases.

* * *

Section 5. Subsection (4) of section 212.08, Florida Statutes, 1982 Supplement, is amended to read:

212.08 [FLA. STAT. ANN. §212.08 (West Suppl. 1984)] Sales, rental, storage, use tax; specified exemptions. . . .

(4) EXEMPTIONS, ITEMS BEARING OTHER EXCISE TAXES, ETC.—Also exempt are water (not exempting mineral water or carbonated water), and; all fuels used by a public or private utility, including any municipal corporation or rural electric cooperative association, in the generation of electric power or energy for sale. Fuel other than motor fuel and special fuel is taxable as provided in this part, except that fuel expressly exempt herein.; and Motor fuels and special fuels on ~~which a tax is imposed by chapter 296 and 297~~ are taxable as provided in part II. ~~All other fuels are taxable,~~ except that those used by vehicles, other than aircraft, which are licensed as common carriers by the Interstate Commerce Commission ~~or by the Civil Aeronautics Board~~ to transport persons or property in interstate or foreign commerce and vessels used to transport persons or property in interstate or foreign commerce are taxable under this part only to the extent provided herein. The basis of the tax shall be the ratio of intrastate mileage to interstate or foreign mileage traveled by the carrier dur-

ing the previous fiscal year of the carrier, such ratio to be determined at the close of the carrier's fiscal year. This ratio shall be applied each month to the total purchases made in this state of gasoline and other fuels to establish that portion of the total used and consumed in intrastate movement and subject to tax under this chapter. . . .

Section 6. Part II of chapter 212, Florida Statutes, consisting of sections 212.60, 212.65, 212.70, 212.80, 212.90, 212.91, 212.92, 212.94, and 212.95, is created to read:

* * *

212.70 [FLA. STAT. ANN. §212.70 (West Suppl. 1984)] Tax imposed on sale of motor fuel and special fuel; tax upon ultimate consumer; determination by department; notification.—

(1) A tax shall be imposed for the privilege of the sale at retail in this state of motor fuel and special fuel.

(2)(a) This levy of tax is upon the ultimate retail consumer. It is hereby provided as a matter of administrative convenience and necessity that the tax shall be paid upon the first sale or transfer of title within this state, whether by a distributor, dealer, or retail dealer, who shall act as agent for the state in the collection of said tax whether such distributor, dealer, or retail dealer is the ultimate seller or not.

* * *

(3) Prior to June 1 of each year, the department shall determine the appropriate sales tax applicable to the retail price per gallon of motor fuel and special fuel as follows:

(a) The department shall determine the appropriate

total motor fuel and special fuel retail price, including any federal, state and local excise taxes on such fuel, for the forthcoming 12-month period beginning June 1, by adjusting the initially established price by the percentage change in the average monthly gasoline price component of the Consumer Price Index, issued by the United States Department of Labor, for the most recent 12-month period ending March 31, compared to said average for the 12-month period ending March 31, 1984. However, the adjustment provided herein shall first be made for the forthcoming 12-month period beginning June 1, 1985.

(b) The tax per gallon shall be computed as 5 percent of said total retail price, rounded to the nearest one-tenth of one cent.

(c) The initially established price is $1.148 per gallon.

(4) The department shall notify each distributor, dealer, and retail dealer of the amount of sales tax to be imposed and collected pursuant to this part on each gallon of motor fuel and special fuel for the 12-month period beginning June 1.

* * *

Section 13. Section 206.42, Florida Statutes, is amended to read:

206.42 [FLA. STAT. ANN. §206.42 (West Supp. 1984)] Aviation motor fuel exempt from excise tax.—Each and every dealer in aviation motor fuel in the state by whatever name designated who sells aviation motor fuel testing 78 octane number (A.S.T.M. method D-357-33T) or higher, of such quality not adapted for use in ordinary motor vehicles, being designed for and sold and exclusively used for aircraft motors, is exempted from the payment of any and all excise taxes levied by the state

upon such motor fuel, except the tax levied under part II of chapter 212.

* * *

Section 38. Section 339.08, Florida Statutes, 1982 Supplement, is amended to read:

339.08 [FLA. STAT. ANN. §339.08 (West Supp. 1984)] Use of gas tax revenue by department.—

(1) The department shall by regulation provide for the expenditure of the moneys in the State Transportation Trust Fund ~~proceeds of the first gas tax~~ accruing to the Division of Road Operations, in accordance with its annual budget.

(2) Such regulations shall provide that the use of said moneys ~~the first gas tax~~ be restricted to the following purposes:

(a) To pay administrative expenses of the department, including administrative expenses incurred by the several state road districts.

(b) To pay the cost of construction of the State Highway System and State Park Road System, including amounts necessary to match federal aid funds for such purposes. The department shall also match federal aid highway funds allocated to the county road and city road systems.

(c) To pay the cost of maintaining the State Highway System and State Park Road System.

(d) To make such other lawful expenditures of the department for the payment of which no other funds may be specified, including the payment of compensation to employees of the Division of Road Operations except those employees whose jobs are designated as "J" in the official

Florida merit system pay plan for overtime work in excess of 40 hours per week or other accepted standard work week, in cash or by way of compensatory time as may be prescribed by regulation of the department. Any other laws in conflict herewith are hereby repealed:

(a) To pay the cost of maintaining state roads which were classified or maintained as primary roads on January 1, 1956, and not included by the road board in the state primary highway system when said system was reclassified by the road board in June 1956, pursuant to the provisions of this code.

* * *

Section 64. (1) This section, sections 1 through 6, and sections 54, 55, 56, and 62 of this act shall take effect March 14, 1983, provided that:

(a) The tax imposed pursuant to part II of chapter 212, Florida Statutes, as created by this act, shall be due and payable commencing April 1, 1983.

* * *

Appendix H

RELEVANT PROVISIONS OF THE NONSCHEDULED AIR SERVICE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF CANADA, TIAS 7826, 25UST 787 (Signed & entered into force May 8, 1974)

The Government of the United States of America and the Government of Canada,

Being Parties to the Convention on International Civil Aviation opened for signature at Chicago on the seventh day of December 1944,[1]

Desiring to conclude an Agreement for the purpose of promoting nonscheduled air services,

Recognizing that the geographic situation of the two countries, including the location of their main centers of population, and the close relationship between their two peoples create a situation unique in international civil aviation,

Desiring to ensure the continued development of a system of air transport free from discriminatory practices, based on an equitable exchange of economic benefits to the two countries, and able to accommodate the needs of the people of the two countries with a minimum of artificial restraint arising from the existence of their common border,

Desiring to ensure equitable opportunity for the air carriers of the two countries to participate in the development of this system and to make optimum use of modern equipment,

[1]TIAS 1591, 3756, 5170, 6605, 6681, 7616; 61 Stat. 1180; 8 UST 179; 13 UST 2105; 19 UST 7693; 20 UST 718; 24 UST 1019. [Footnote added by the Department of State.]

Recognizing the existence, continuing importance, and contribution to international aviation of the Air Transport Agreement for vital scheduled services,[2] and of the Agreement on Air Transport Preclearance of air travellers,[3]

Believing furthermore that the Air Transport Agreement for scheduled air services between their territories and the Agreement on Air Transport Preclearance of air travellers should be complemented by an agreement covering nonscheduled air services between their territories, and

Desiring to ensure the orderly development of such nonscheduled air services consistent with their interests in maintaining a sound system of scheduled air services between their respective territories,

Have agreed as follows:

ARTICLE I

For the purpose of this Agreement:

(a) "Agreement" shall mean this Agreement, the Annexes attached thereto, and any amendments thereto.

(b) "Aeronautical authorities" shall mean, in the case of the United States of America, the Federal Aviation Administration with respect to the technical permission and safety standards and requirements referred to in

[2]TIAS 5972, 7824; 17 UST 201 . . . [Footnote added by the Department of State.]

[3]TIAS 7825 . . . [Footnote added by the Department of State.]

Articles III and VI (2) respectively, otherwise the Civil Aeronautics Board, and in the case of Canada, the Canadian Air Transportation Administration with respect to the technical permission and safety standards and requirements referred to in Articles III and VI (2) respectively, otherwise the Canadian Transport Commission, or in both cases, any person or agency authorized to perform the functions exercised at present by those authorities.

(c) "Carrier" or "carriers" shall mean an air carrier or carriers designated by one Contracting Party in writing to the other Contracting Party to be a carrier which will operate any of the nonscheduled air services provided for in this Agreement.

(d) "Territory" in relation to a Contracting Party shall mean the land areas under the sovereignty, jurisdiction or trusteeship of the Contracting Party, and territorial waters adjacent thereto.

(e) "Traffic" shall mean such traffic as is specifically provided for in the Annexes attached hereto.

(f) "Nonscheduled air service" shall mean such air service as is specifically provided for in the Annexes attached hereto.

(g) "Enplane" shall mean the first taking on board of nonscheduled air service traffic on an aircraft of a carrier.

(h) "Deplane" shall mean any deboarding of nonscheduled air service traffic from an aircraft of a carrier but shall not include deboarding for nontraffic purposes.

(i) "Re-enplane" shall mean any taking on beard on an aircraft of a carrier of nonscheduled air service traffic which has enplaned and deplaned.

(j) "Air Transport Agreement" shall mean the Air Transport Agreement between the Government of the United States of America and the Government of Canada signed on January 17, 1966, as amended, or any agreement which may supersede it.

(k) "Rates" shall be deemed to include all tariffs, tolls, fares, and charges for transportation, and the conditions of carriage, classifications, rules, regulations, practices, and services related thereto.

ARTICLE II

1. Each Contracting Party grants to the other Contracting Party the rights specified in the Annexes attached hereto for the carriers of the other Contracting Party to enplane, deplane, and re-enplane nonscheduled air service traffic.

2. Nothing herein is intended to affect services not covered by this Agreement.

ARTICLE III

1. Each Contracting Party shall have the right to designate, by diplomatic note to the other Contracting Party, a carrier or carriers to operate any of the nonscheduled air services provided in this Agreement.

2. Upon receipt of a designation made by one Contracting Party, and upon receipt from the carrier of an application or applications in the form and manner prescribed for such applications, the aeronautical authorities of the other Contracting Party shall grant to the carrier, subject to the provisions of Articles IV and VI, and with a minimum of procedural delay, appropriate licensing and tech-

nical authorization to operate the nonscheduled air services provided for in this Agreement.

3. The aeronautical authorities of one Contracting Party may require a carrier of the other Contracting Party to satisfy them that it is qualified to fulfill the conditions prescribed under the laws and regulations normally and reasonably applied by them to the operation of international commercial air services.

ARTICLE IV

1. Each Contracting Party reserves the right to withhold, revoke or impose conditions on the authorization referred to in Article III with respect to a carrier of the other Contracting Party in the event that:

(a) Such carrier fails or ceases to qualify before the aeronautical authorities of the first Contracting Party under the laws and regulations normally applied by those authorities;

(b) Such carrier fails to comply with the laws and regulations referred to in Article V; or

(c) The first Contracting Party is not satisfied that substantial ownership and effective control of such carrier are vested in the Contracting Party designating the airline or in nationals of that Contracting Party.

2. Unless immediate action is essential to prevent further infringement of the laws and regulations referred to in Article V, the right to revoke the authorization provided for in paragraph 1 above shall be exercised only after consultation with the other Contracting Party.

ARTICLE V

1. The laws and regulations of one Contracting Party relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of the carrier or carriers of the other Contracting Party, and shall be complied with by such aircraft upon entrance into, departure from, and while within the territory of the first Contracting Party.

2. The laws, regulations, and procedures of one Contracting Party relating to the admission to or departure from its territory of passengers, baggage, cargo or crew of aircraft, including regulations and procedures relating to prevention of unlawful interference with aircraft, entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, baggage, cargo or crew of the carrier or carriers of the other Contracting Party upon entrance into, departure from, and while within the territory of the first Contracting Party.

ARTICLE VI

1. Certificates of airworthiness, certificates of competency, and licenses issued or rendered valid by one Contracting Party, and still in force, shall be recognized as valid by the other Contracting Party for the purpose of operating the services provided for in this Agreement, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established pursuant to the Convention on International Civil Aviation. Each Contracting Party reserves the right,

however, to refuse to recognize, for the purpose of flights above its own territory, certificates of competency and licenses granted to its own nationals by the other Contracting Party.

2. The competent aeronautical authorities of each Contracting Party may request consultations concerning the safety standards and requirements relating to aeronautical facilities, operations, airmen, and aircraft, which are maintained and administered by the other Contracting Party. If, following such consultations, the competent aeronautical authorities of either Contracting Party find that the other Contracting Party does not effectively maintain and administer safety standards and requirements in these areas that are equal to or above the minimum standards which may be established pursuant to the Convention on International Civil Aviation, they will notify the other Contracting Party of such findings and the steps considered necessary to bring the safety standards and requirements of the other Contracting Party up to standards at least equal to the minimum standards which may be established pursuant to said Convention, and the other Contracting Party will take appropriate corrective action. Each Contracting Party reserves the right to withhold or revoke the technical authorization referred to in Article III of this Agreement with respect to a carrier of the other Contracting Party, or to impose conditions on such authorization, in the event the other Contracting Party does not take such appropriate action within a reasonable time.

ARTICLE VII

1. Each Contracting Party shall have the right to promulgate and enforce laws and regulations governing nonscheduled air service. Such regulations shall be ap-

plied consistently with this Agreement and without discrimination against or among carriers of the other Contracting Party.

2. Where both Contracting Parties have promulgated regulations governing the same specific type of service covered in an Annex, the regulations of the Contracting Party in whose territory the enplanement occurs shall govern, unless otherwise agreed.

3. Where one Contracting Party has promulgated regulations governing a specific type of service covered in an Annex, and the other Contracting Party has not, that other Contracting Party shall accept the applicability of such regulations with respect to traffic enplaned in the territory of the first Contracting Party, unless otherwise agreed.

4. Each Contracting Party shall have the right, if the other Contracting Party promulgates regulations which alter the basic character of a specific type of service covered in an Annex, to refuse to accept the applicability of such regulations with respect to traffic enplaned in the territory of that other Contracting Party, notwithstanding the provisions of paragraphs 2 and 3 above. Such action shall normally be taken only after consultation with the other Contracting Party.

5. Either Contracting Party may submit to the other Contracting Party proposed new specific types of service for inclusion in an Annex to this Agreement. Such proposals shall normally be accompanied by explanatory statements. The other Contracting Party shall either accept the new specific types of service within sixty days of receipt, in which case they shall be incorporated into an Annex to the Agreement by an exchange of diplomatic

notes; or it shall indicate a willingness to consult promptly with the first Contracting Party.

6. Each Contracting Party may adopt and apply requirements relating to licensing procedures, administrative matters, or the collection of information, such as requirements concerning tariffs, traffic data, manifests, and similar matters.

ARTICLE VIII

The volume of nonscheduled air service traffic between the territories of the two Contracting Parties enplaned by the carriers of one Contracting Party in the territory of the other Contracting Party shall be reasonably related to the volume of such traffic enplaned by carriers of the first Contracting Party in its own territory and deplaned or reenplaned in the territory of the other Contracting Party, taking into account the nature of the respective markets. Provisions to implement this Article shall be established in the Annexes to this Agreement.

ARTICLE IX

1. Nonscheduled air service traffic between the territories of the two Contracting Parties transported by the carriers of one Contracting Party shall not cause substantial impairment of the scheduled air services of the scheduled airlines of the other Contracting Party or of the nonscheduled air services of the carriers of the other Contracting Party.

2. Unless otherwise agreed, neither Contracting Party may impose: (a) any requirement that prior approval be obtained for any individual flight or series of flights by a carrier or carriers of the other Contracting Party which

has qualified before the competent aeronautical authorities of the first Contracting Party; or (b) any restrictions on such carrier or carriers with respect to capacity, frequency or type of aircraft employed on nonscheduled air services provided for by this Agreement.

ARTICLE X

If, after review over a period of time, the laws or reguations of either Contracting Party or the operations by the carrier or carriers of one Contracting Party performed pursuant to this Agreement appear to the other Contracting Party to constitute substantial impairment of the scheduled or nonscheduled air services of the scheduled airlines or the carriers of the other Contracting Party, that other Contracting Party may request consultations in accordance with Article XV.

ARTICLE XI

1. The rates to be charged by the carriers of either Contracting Party for carriage to or from the territory of the other Contracting Party shall be reasonable, considering all relevant factors bearing upon the economic characteristics of prescribed nonscheduled air services provided for in this Agreement.

2. If the aeronautical authorities of one Contracting Party are dissatisfied with a proposed or existing rate of a carrier or carriers of the other Contracting Party, that other Contracting Party shall be so informed and the Contracting Parties shall exercise their best efforts to resolve the matter through prior consultations. Each Contracting Party shall retain the right to apply its laws and regulations with respect to such rates.

3. The aeronautical authorities of each Contracting Party shall exercise their best efforts to ensure that the rates charged and collected conform to the rates filed and in effect with each Contracting Party, and that no carrier rebates any portion of such rates by any means, directly or indirectly, including the payment of excessive sales commissions to agents.

ARTICLE XII

1. Each Contracting Party shall exempt the carriers of the other Contracting Party to the fullest extent possible under its national law from import restrictions, customs duties, excise taxes, inspection fees, and other national duties and charges on fuel, lubricants, consumable technical supplies, spare parts including engines, regular equipment, ground equipment, stores, and other items intended for use solely in connection with the operation, maintenance or servicing of aircraft of the carriers of the other Contracting Party. The exemptions granted by this paragraph shall apply to items:

(a) introduced into the territory of one Contracting Party by or on behalf of the carriers of the other Contracting Party;

(b) retained on board aircraft of the carriers of one Contracting Party upon arriving in or leaving the territory of the other Contracting Party;

(c) taken on board aircraft of the carriers of one Contracting Party in the territory of the other Contracting Party and intended solely for use in international air services;

whether or not such items are consumed wholly within the territory of the Contracting Party granting the exemption.

2. The exemptions provided by this Article shall also be available in situations where a carrier or carriers of one Contracting Party have entered into arrangements with one or more carriers or airlines to receive and use on loan or on transfer in the territory of the other Contracting Party the items specified in paragaph 1 above, provided that each such other carrier or airline is similarly entitled to such exemptions from the other Contracting Party.

ARTICLE XIII

1. Each Contracting Party may impose or permit to be imposed just and reasonable charges for the use of public airports and other facilities under its control, provided that such charges shall not be higher than the charges imposed for the use of such airports and facilities by its national aircraft engaged in similar international services.

2. Neither Contracting Party shall give a preference to its own carriers over the carriers of the other Contracting Party in the application of its customs, immigration, quarantine, and similar regulations or in the use of airports, airways, and other facilities under its control.

ARTICLE XIV

Neither Contracting Party shall discriminate against a carrier or among carriers of the other Contracting Party providing the services covered by this Agreement.

ARTICLE XV

Either Contracting Party may at any time request consultations on the interpretation, application or amendment of this Agreement. Such consultations should

commence as soon as practicable but not later than sixty days from the date of receipt of the request for consultations, unless otherwise agreed by the Contracting Parties.

ARTICLE XVI

1. Any dispute with respect to matters covered by this Agreement not satisfactorily resolved through consultation shall, upon request of either Contracting Party, be submitted to arbitration in accordance with the procedures set forth herein.

2. Arbitration shall be by a tribunal of three arbitrators constituted as follows:

(a) One arbitrator shall be named by each Contracting Party within two months of the date of delivery by either Contracting Party to the other of a request for arbitration. Within one month after such period of two months, the two arbitrators so designated shall by agreement designate a third arbitrator, provided that such arbitrator shall not be a national of either Contracting Party.

(b) If either Contracting Party fails to designate an arbitrator, or if the third arbitrator is not agreed upon in accordance with subparagraph (a) above, either Contracting Party may request the President of the Council of the International Civil Aviation Organization to designate the necessary arbitrator or arbitrators.

3. The Contracting Parties shall use their best efforts consistent with national law to put into effect any decision or award of the arbitral tribunal.

4. The expenses of the arbitral tribunal, including the fees and expenses of the arbitrators, shall be shared equally by the Contracting Parties.

ARTICLE XVII

Either Contracting Party may at any time notify the other Contracting Party by diplomatic note of its intention to terminate this Agreement. Such notice shall be sent simultaneously to the International Civil Aviation Organization. The Agreement shall terminate one year after the date of receipt of the notice of intention to terminate, unless by agreement between the Contracting Parties such notice is withdrawn before the expiration of that time.

ARTICLE XVIII

This Agreement shall come into force on the day it is signed.

SPECIFIED RIGHTS

I. Definitions

For the purpose of providing the services covered by this Agreement and its Annexes:

A. "Large aircraft" shall mean an aircraft having both:

(1) a maximum passenger capacity of more than 30 seats or a maximum payload capacity of more than 7,500 pounds; and

(2) a maximum authorized take-off weight on wheels greater than 35,000 pounds.

B. "Small aircraft" shall mean an aircraft which is not a "large aircraft" as defined above.

C. "Maximum passenger capacity" and "maximum payload capacity" shall have the meanings assigned to them in regulations of the Civil Aeronautics Board.

D. "Maximum authorized take-off weight on wheels" shall have the meaning assigned to it in regulations of the Canadian Transport Commission.

II. United States of America

Subject to the requirements of this and other Annexes to the Agreement, a carrier or carriers of the United States of America, when providing the services prescribed in Annex B to this Agreement for the movement of nonscheduled air service traffic between a point or points in the territory of one Contracting Party and a point or points in the territory of the other Contracting Party (including transportation by other modes on either an outgoing or return leg of a round-trip journey), shall be entitled to:

A. Enplane (and subsequently deplane on return trips) at any point or points in the territory of Canada nonscheduled air service traffic which is to be deplaned or re-enplaned at any point or points in the territory of the United States.

B. Deplane or re-enplane at any point or points in the territory of Canada nonscheduled air service traffic which has been enplaned at any point or points in the territory of the United States.

III. Canada

Subject to the requirements of this and other Annexes to the Agreement, a carrier or carriers of Canada, when providing the services prescribed in Annex B to this Agreement for the movement of nonscheduled air service traffic between a point or points in the territory of one Contracting Party and a point or points in the territory of the other Contracting Party (including transportation by other modes on either an outgoing or return leg of a round-trip journey), shall be entitled to:

A. Enplane (and subsequently deplane on return trips) at any point or points in the territory of the United States nonscheduled air service traffic which is to be deplaned or re-enplaned at any point or points in the territory of Canada.

B. Deplane or re-enplane at any point or points in the territory of the United States nonscheduled air service traffic which has been enplaned at any point or points in the territory of Canada.

* * *

V. Conditions and Interpretations

A. Transportation under this Agreement of traffic having a prior, subsequent or intervening movement by any mode of air transportation to or from territories other than those of the United States and Canada is prohibited, except for passengers moving independently of any group.

B. The performance of any otherwise authorized nonscheduled air service by a carrier as an aircraft lessee shall be considered as an operation under this Agreement, subject to conditions which either Contracting Par-

ty may establish governing "dry" or "wet" leases. However, operations conducted by a carrier as a lessor of an aircraft shall not be deemed to be within the scope of this Agreement insofar as the lessor is concerned.

* * *

F. A carrier of one Contracting Party may not take on board at one point in the territory of the other Contracting Party nonscheduled air service traffic destined for another point or points in the territory of such other Contracting Party. However, a carrier of one Contracting Party may provide a stopover at any such points to:

(1) Nonscheduled air service traffic in passengers carried on large aircraft which has been enplaned in the territory of the Contracting Party of which such carrier is a national and which is moving under a contract providing for nonscheduled air service transportation on the same carrier to or from a point or points in the territory of the Contracting Party of which such carrier is a national, even if a different aircraft is used; and. . . .

* * *

PRESCRIBED SERVICES

I. Definitions

For the purpose of providing the services prescribed in this Annex:

A. "Nonscheduled air service" shall be limited to "charter air service" permitted hereunder.

B. "Traffic" shall mean passengers, including their accompanied baggage, and property, but shall not include passengers and property moved under contract to the military authorities of either Contracting Party.

C. "Charter air service" shall mean commercial air transportation of traffic on a time, mileage or trip basis by a carrier or carriers, where the entire planeload capacity of one or more aircraft has been engaged.

D. "Single Entity" shall, with respect to enplanements in the Territory of Canada, have the meaning assigned to "entity" in the regulations of the Canadian Transport Commission.

E. "Property" shall, with respect to enplanements in the Territory of Canada, have the meaning assigned to "goods" in the regulations of the Canadian Transport Commission.

II. Prescribed Service Types—Large Aircraft

The following types of charter air service may be performed with large aircraft for enplanements by carriers in the territories indicated:

	Types	Territory
A.	As set forth in Civil Aeronautics Board Regulations	
	Single Entity Passenger	United States of America
	Single Entity Property	
	Pro Rata Affinity	
	Mixed (Entity/Pro Rata)	
	Inclusive Tour	
	Study Group	
	Overseas Military Personnel	
	Travel Group	
	NOTE: The same aircraft may be chartered to more than one charterer and/or for transportation of more than one group solely pursuant to conditions set forth in the regulations referred to above.	

Types	Territory
B. As set forth in Canadian Transport Commission Air Carrier Regulations	
Single Entity Passenger	Canada
Single Entity Property	
Pro Rata Common Purpose	
Advance Booking	
Inclusive Tour	
NOTE: The same aircraft may be chartered to more than one charterer and/or for transportation of more than one group solely pursuant to conditions set forth in the regulations referred to above.	

* * *

IV. Conditions and Requirements

A. The aeronautical authorities of the Contracting Party in which the traffic is to be enplaned may withhold approval with respect to charterworthiness of a flight, series of flights or part of a series of flights proposed to be operated by a carrier of the other Contracting Party if the charterworthiness criteria, conditions and requirements established by the first Contracting Party are not met, provided, however, that:

(1) Notification of any withholding of such approval is given to the carrier within (a) 30 days of the initial filing in the case of other than single entity charters, or (b) 10 days of the initial filing in the case of single entity charters;

(2) Any such withholding of approval shall be withdrawn if the charterworthiness criteria, conditions, and requirements are subsequently met; and

(3) Approval may be revoked at any time if the charterworthiness criteria, conditions, and requirements are not met.

B. Charterworthiness criteria, conditions, and requirements shall be applied by the aeronautical authorities of the Contracting Party in which the traffic is to be enplaned on an objective and non-discriminatory basis to the carriers of both Contracting Parties.

Appendix I

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.
Order 89-8-97

Adopted by the Civil Aeronautics Board at its office in Washington, D.C. on the 18th day of July, 1980

Docket 27817

Application of
WARDAIR CANADA (1975), LTD.
for renewal and amendment of foreign air carrier permits pursuant to section 402 of the Federal Aviation Act of 1958, as amended

ORDER

By Order 80-6-150, adopted June 24, 1980, the Board directed all interested persons to show cause why the Board should not, subject to the disapproval of the President, renew and amend two foreign air carrier permits held by Wardair Canada (1975), Ltd. The first permit authorizes, for an indefinite period, charter flights of persons and their accompanied baggage, and property between any point or points in Canada and any point or points in the United States, subject to conditions. The second permit authorizes, for a period of five years: (a) circle tour charter flights originating and terminating in Canada and serving a point or points in the United States and a point or points in a third country; (b) charter flights originating at a point or points in 20 named European countries and serving any point or points in the United States; (c) circle tour charter flights originating and terminating at the same point or points in 20 named Europe-

an countries and serving a point or points in the United States and a point or points in any country other than the named European countries and the United States; and (d) charter flights, other than those described above, subject to prior Board approval. The charter authority described in (a), (b), and (c) above is limited to the carriage of persons and their accompanying baggage, subject to conditions.

The order directed persons objecting to the Board's tentative findings and conclusions set forth in that order, or to the issuance of the proposed foreign air carrier permits, to file their objections within 21 days. In addition, the order provided that in the event no objections were filed, all further procedural steps would be considered waived, and the Secretary would enter an order which (1) would make final the Board's tentative findings and conclusions, and (2) subject to the disapproval of the President pursuant to section 801(a) of the Act, would issue the foreign air carrier permits to Wardair Canada (1975), Ltd. in the forms attached to the order.

No objections to Order 80-6-150 have been filed.

ACCORDINGLY,

1. We make final our tentative findings and conclusions set forth in Order 80-6-150;

2. We are issuing foreign air carrier permits in the forms attached to Wardair Canada (1975), Ltd.;

3. The authority granted in the attached permits to operate property charters shall be limited to planeload property charter until such time as the Board may amend Part 214 of its Economic Regulations to include the regulation of property charters;

4. Wardair Canada (1975), Ltd. will apply to the Director, Bureau of International Aviation for authorization to operate each flight or series of flights under the authority contained in paragraph D of the attached permit which grants, among others, circle tour and Fifth Freedom charter authority for a period of five years. The applications shall contain the information required on CAB Form 433, which may be used for this purpose. The requests for such authority must be received five business days before flight departure. Telephone applications may be permitted on less than five days notice and approvals granted verbally when special circumstances require this procedure;

5. The public interest requires that the exercise of the privileges granted by the attached permit which authorizes charter foreign air transportation between the United States and Canada for an indefinite period, should be subject to the terms, conditions, and limitations contained in the permit, to such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Board, and to the following condition:

> The holder shall not engage in the carriage of persons in foreign air transportation between the United States and Canada to or from a point in Ontario, west of a line drawn due north from Blind River, Ontario (46°11′ North Latitude, 82°58′ West Longitude) and extending to the border between Ontario and Manitoba, which is not a resort, camp, or outpost operated by a person duly licensed for such purpose by the Government of the Province of Ontario, nor the licensed base of a Canadian charter air carrier, nor a Canadian Customs port of entry; and is required on each flight out of the restricted area to make a stop at a Canadian Customs port of entry or at the licensed

> base of a Canadian charter air carrier where officers of the Ontario Ministry of Natural Resources may be available to make such inspection as they consider desirable; and shall have available on its aircraft for inspection by the U.S. authorities satisfactory evidence that it has complied with these conditions: *Provided*, however, that the above prohibition shall not apply to flights performed for purposes of medical evacuation, or other similar emergency situations; *provided* further that, when the circumstances warrant, the Board may, upon application by the holder, waive all or any part of these restrictions; and *provided* further that the holder shall clearly notify in writing all persons who contract for the holder's services of the limitations imposed on its operations;[1]

6. The Secretary of the Board shall sign the permits on our behalf and shall affix the seal of the Board;

7. Unless disapproved by the President of the United States under section 801(a) of the Act, this order and the permits attached shall become effective on the 61st day after their submission to the President,[2] or upon the date of receipt of advice from the President that he does not intend to disapprove the Board's order under this section, whichever is earlier; and

8. Wardair Canada (1975), Ltd. shall be a party to the rulemaking proceeding regarding insurance requirements in EDR-395, Docket 37531 and to the accompanying Show Cause Order 80-1-75, Docket 37532, 45 FR 7566 (February 4, 1980).

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[1] See Order 79-6-83, effective June 12, 1979.

[2] This order was submitted to the President on July 22, 1980. We received notification that the President did not intend to disapprove the board's Order on August 18, 1980.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

(SEAL)
All Members concurred.

Issued by
Order 80-8-97

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

PERMIT TO FOREIGN AIR CARRIER
(as amended)

WARDAIR CANADA (1975), LTD.

is authorized, subject to the following provisions, the provisions of the Federal Aviation Act of 1958, as amended, and the Board's orders, rules, and regulations, to engage in charter foreign air transportation, as follows:

> Charter flights with respect to persons and their accompanying baggage, and property, between any point or points in Canada and any point or points in the United Statess.

The holder shall be authorized to perform those types of charters originating in Canada and in the United States, as are now, or may be, prescribed in Annex B of the Nonscheduled Air Services Agreement between the United States and Canada, signed May 8, 1974, including any amendments, supplements, reservations, or supersessions to that Agreement.

This permit shall be subject to the following terms, conditions and limitations:[1]

(1) The authority of the holder to perform United States-originating large aircraft charter flights shall be subject to the provisions of the Board's Regulations governing charters. The authority of the holder to perform

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[1]The exercise of the privileges granted by this permit is also subject to the conditions set forth in paragraph 5 of the order issuing this permit, which shall remain in effect until further order of the Board.

United States-originating small aircraft charter flights shall be limited to commercial air transportation of passengers and their accompanied baggage, and property, on a time, mileage or trip basis, where the entire planeload capacity of one or more aircraft has been engaged by a person for his own use or by a person for the transportation of a group of persons and/or their property, as agent or representative of such group.[2] The authority of the holder to perform Canadian-originating charter flights shall be subject to the Air Carrier Regulations of the Canadian Transport Commission. The holder shall, nevertheless, not be authorized to provide charters of a type other than as authorized by Annex B of the Nonscheduled Air Services Agreement between the United States and Canada, signed May 8, 1974, including any amendments, supplements, reservations or supersessions to that Agreement.

(2) The holder shall not engage in foreign air transportation between the United States and any point or points, other than a point or points in Canada, or transport any property or persons whose journey includes a prior, subsequent, or intervening movement by air (except for the movement of passengers independently of any group) to or from a point not in the United States or Canada:

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[2]Annex A(I)(A) of the Nonscheduled Air Service Agreement between the United States and Canada, signed May 8, 1974, defines a "large aircraft" as an aircraft having both: (1) a maximum passenger capacity (as determined by Board Regulations) of more than 30 seats or a maximum payload capacity (as determined by Board Regulations) of more than 7,500 pounds; and (2) a maximum authorized takeoff weight on wheels (as determined by Canadian Transport Commission Regulations) greater than 35,000 pounds. A "small aircraft" is defined as an aircraft which is not a "large aircraft."

Provided, That the Board may, upon application by the holder, or by regulation, authorize the performance of charters where such movements are involved.

(3) The holder shall not perform United States-originating charter flights which at the end of any calendar quarter would result in the aggregate number of all United States-originating charter flights performed by the holder on or after May 8, 1974, exceeding by more than one-third the aggregate number of all Canadian-originating charter flights performed by the holder on or after May 8, 1974: *Provided*, That the Board may authorize the performance of charter flights not meeting the requirements set forth. For the purpose of making such computation the provisions of Annex A of the Nonscheduled Air Services Agreement between the United States and Canada, signed May 8, 1974, including any amendments, supplements, reservations or supersessions to that Agreement, shall apply.[3]

(4) The holder may grant stopover privileges at any point or points in the United States only to passengers (and their accompanied baggage) moving (a) on a Canadian-originating large aircraft flight operating under a contract for charter transportation to be provided solely by the holder (even if a different aircraft is used), or (b) on a Canadian-originating small aircraft flight operating under a contract for round-trip charter transportation to be provided solely by the holder and as to which the same

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[3]A charter shall be considered to originate in the United States (or Canada) if the passengers or property are first taken on board in that country, and shall be considered as one flight whether the charter be one-way, round-trip, circle tour, or open jaw, even if a separate contract is entered into for a return portion of the charter trip from Canada (or the United States).

aircraft stays with the passengers throughout the journey: *Provided*, That the Board ma authorize the performance of charters not meeting the requirements set forth.

(5) The Board, by order or regulation and without hearing, may require advance approval of individual charter trips conducted by the holder pursuant to the authority granted by this permit, if it finds such action to be required in the public interest.

(6) The holder shall conform to the airworthiness and airman competency requirements prescribed by the Government of Canada for Canadian international air service.

(7) This permit shall be subject to all applicable provisions of any treaty, convention, or agreement affecting international air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and Canada shall be parties.

(8) The holder shall keep on deposit with the Board a signed counterpart of CAB Agreement 18900, an agreement relating to liability limitations of the Warsaw Convention and the Hague Protocol approved by Board Order E-23680, May 13, 1966, and a signed counterpart of any amendment or amendments to such agreement which may be approved by the Board and to which the holder becomes a party.

(9) The holder (a) shall not provide foreign air transportation under this permit unless there is in effect third-party liability insurance in the amount of $1,000,000 or more to meet potential liability claims which may arise in connection with its operations under this permit, and unless there is on file with the Docket Section of the Board

a statement showing the name and address of the insurance carrier and the amounts and liability limits of the third-party liability insurance provided, and (b) shall not provide foreign air transportation with respect to persons unless there is in effect liability insurance sufficient to cover the obligations assumed in CAB Agreement 18900, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the insurance carrier and the amounts and liability limits of the passenger liability insurance provided. Upon request, the Board may authorize the holder to supply the name and address of an insurance syndicate in lieu of the names and addresses of the member insurers.[4]

(10) By accepting this permit, the holder waives any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against the holder in any court or other tribunal in the United States (or its territories or possessions) based upon any claim arising out of operations by the holder under this permit.

(11) The exercise of the privileges granted by this permit shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Board.

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[4] By EDR-395, January 28, 1980, Docket 37531 and 37532, 45 FR 7566, February 4, 1980, and accompanying Show Cause Order 80-1-176, the Board proposed to adopt a new Part 205 of its Regulations to require $20,000,000 in third party liability insurance, with $300,000 per person passenger and third-party liability coverage, and to amend foreign air carrier permits to make them subject to the new regulations. The holder will be subject to the insurance requirements provided for in those regulations as they may be finally adopted.

This permit shall become effective on August 18, 1980. Unless otherwise terminated at an earlier date under the terms of any applicable treaty, convention, or agreement, this permit shall terminate (1) upon the effective date of any treaty, convention, or agreement, or amendment, which shall have the effect of eliminating the charter foreign air transportation authorized by this permit from the transportation which may be operated by carriers designated by the Government of Canada (or in the event of the elimination of any part of the charter foreign air transportation authorized, the authority granted shall terminate to the extent of such elimination); or (2) upon the effect date of any permit granted by the Board to any other carrier designated by the Government of Canada in lieu of the holder; or (3) upon the termination or expiration of the Nonscheduled Air Services Agreement between the United States and Canada, signed May 8, 1974; However, clause (3) of this paragraph shall not apply if, prior to the occurrence of the event specified in clause (3), the operation of the foreign air transportation authorized becomes the subject of any treaty, convention, or agreement to which the United States and Canada are or shall become parties.

The Civil Aeronautics Board, through its Secretary, has executed this permit and affixed its seal on July 18, 1980.

PHYLLIS T. KAYLOR
Secretary

(SEAL)

Issued by
Order 80-8-97

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

PERMIT TO FOREIGN AIR CARRIER
(as amended)

WARDAIR CANADA (1975), LTD.

is authorized, subject to the following provisions, the provisions of the Federal Aviation Act of 1958, as amended, and the Board's orders, rules, and regulations, to engage in charter foreign air transportation, as follows:

A. Circle tour charter flights of persons and their accompanying baggage which originate and terminate at a point or points in Canada and serve a point or points in the United States and a point or points in any country other than Canada and the United States.

B. Charter flights of persons and their accompanying baggage between a point or points in Austria, Belgium, Cyprus, Denmark, Finland, Federal Republic of Germany, France, Greece, Ireland, Italy, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, and Yugoslavia, and any point or points in the United States, limited to charter flights which originate in a named European country.

C. Circle tour charter flights of persons and their accompanying baggage which originate and terminate at the same point or points in Austria, Belgium, Cyprus, Denmark, Finland, Federal Republic of Germany, France, Greece, Ireland, Italy, Luxembourg, Malta, Nether-

lands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, and Yugoslavia, and serve a point or points in the United States and a point or points in any country other than a named European country and the United States.

D. Charter flights, other than those described in paragraphs, A, B, and C above, subject to prior Board approval.

This permit shall be subject to the following terms, conditions, and limitations:

(1) With respect to the authorization contained in paragraph A, the holder shall not engage in foreign air transportation between the United States and any point or points, other than a point or points in Canada, or transport any person whose journey, by any means of transportation, includes a prior, subsequent, or intervening movement to or from a point not in the United States or Canada: *Provided*, That this condition shall not prevent the holder, under the authorization contained in paragraph A, from serving a point or points in any foreign country between the point of origin and point of termination of the charter flight in Canada, or prevent the holder from carrying between a point or points in Canada and a point or points in the United States charter passengers originating in one of the European points named in paragraph C.

(2) With respect to the authorization contained in paragraph D, such flights must be individually approved by the Board unless this requirement is waived by Board order. Application shall be made as provided in the order issuing this permit or as required by subsequent Board order or regulation.

(3) The authority of the holder to perform circle tour charters originating in Canada shall be subject to the terms, conditions, and limitations contained in licenses issued by the Air Transport Committee of the Canadian Transport Commission authorizing the performance of such charters.

(4) The Board, by order or regulation and without hearing, may require advance approval of individual charter trips conducted by the holder pursuant to the authority granted by this permit, if it finds such action to be required in the public interest.

(5) The authority of the holder to exercise the privileges granted by this permit shall be subject to the provisions of Part 214 of the Board's Economic Regulations, other regulations of the Board governing tours or charters, and all amendments and revisions adopted by the Board.

(6) The holder shall conform to the airworthiness and airman competency requirements prescribed by the Government of Canada for Canadian international air service.

(7) The holder shall not operate any aircraft under the authority granted by this permit unless the holder complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention.

The Civil Aeronautics Board, through its Secretary, has executed this permit and affixed its seal on July 18, 1980.

PHYLLIS T. KAYLOR
Secretary

(SEAL)

Appendix J

United States Department of State Taxes
Washington, D.C. 20520
September 29, 1982

Mr. Randy Miller
Director
Department of Revenue
102 Carlton Building
Calhoun Street
Talahassee, Florida 32301

Dear Mr. Miller:

The Department of State is seeking your cooperation in an important matter affecting U.S. international aviation relations.

The U.S. Government exempts foreign airlines from customs duties, taxes, fees and other national charges on their aircraft, fuel, and aviation related materials. These exemptions include such items as lubricants, consumable technical supplies, spare parts (including engines) and aircraft stores (including food, beverages and tobacco). The United States obligation to accord these exemptions stems from our adherence to Article 24 of the International Convention on Civil Aviation (Chicago, 1944) and to the air transport agreements which the United States has with over 70 foreign countries. In some cases, such as the absence of a bilateral aviation agreement, exemptions are accorded foreign airlines pursuant to a finding of reciprocity.

Governments of a number of countries have recently brought to our attention that their airlines are required to pay state and local taxes on items for which the U.S. Government grants an exemption from federal taxes.

Some foreign governments have questioned the appropriateness of imposing these state and local taxes on foreign air carriers in view of the generally-accepted and long-standing international practice of reciprocally exempting such items from taxes. A few such governments have raised the possibility that state and local authorities in their jurisdictions could impose similar taxes on U.S. airlines. A proliferation of state and local taxes would frustrate the international system of reciprocal tax exemptions and thereby significantly increase the cost of international air transportation.

We urge, therefore, that you exempt foreign air carriers from taxes levied in your jurisdiction on items for which the U.S. Government provides an exemption. To ensure that U.S. airlines enjoy reciprocal treatment abroad, we recommend that you grant such exemptions only to foreign airlines which demonstrate that state and local authorities in their country exempt U.S. airlines from taxes.

In order to respond to foreign government inquiries, we would appreciate knowing precisely what state and local charges you currently levy on foreign airlines. Such information would be particularly helpful if you would indicate whether the charges are indeed taxes or whether they are fees for services rendered. Information concerning actual and proposed exemptions for foreign airlines would also be useful.

We appreciate your assistance and cooperation in this matter.

Sincerely,
MATTHEW V. SCOCOZZA
Deputy Assistant Secretary
for Transportation and

Telecommunication

cc: Mr. Grover C. Jones
Chief, Bureau of Aviation
Florida Dept. of Transportation
605 Suwannee St.
Mail Station 46
Talahassee, Florida 32301

Mr. Richard Judy
Director
Miami International Airport
Box 59-2075, AMF
Miami, Florida

Appendix K

STATE OF FLORIDA
DEPARTMENT OF REVENUE
TALLAHASSEE, 32301

October 25, 1982

Mr. Matthew V. Scocozza
Deputy Assistant Secretary
for Transportation and Telecommunication
United States Department of State
Washington, D. C. 20520

Dear Mr. Scocozza:

This will answer your letter of September 29 regarding taxation of foreign airlines.

The State of Florida recognized the importance of foreign airlines (and steamships) many years ago, and in spite of increased tax rates and bases over the years, the generous tax advantages allowed them have not changed.

Examples of these tax advantages are:

1. They are totally exempt from the state 8¢ motor fuel tax (the same as domestic commercial airlines) on all fuel placed aboard the aircraft.

2. The state's sales and use tax applies only to the ratio of miles flown in Florida to total system miles. The very short distance out of Miami, Ft. Lauderdale, Tampa and Jacksonville is so minute, and since we must recognize any tax properly imposed by another state or taxing jurisdiction, the result is that practically no Florida sales and use tax is realized from foreign carriers on their purchases of aircraft, parts, fuel, certain ground and loading equipment, etc.

This letter relates to state imposed taxes only. Any taxes and/or fees imposed by local taxing authorities are something we have very little knowledge of and no control over.

We are taking the liberty of forwarding a copy of your letter to Governor Bob Graham for review by his policy issue staff, and if there is some particular issue not covered in this response, please let us hear from you again.

Sincerely,
RANDY MILLER
Executive Director

RM/vam

cc: Honorable Bob Graham
Mr. Grover C. Jones
Mr. Richard Judy

Appendix L

DEPARTMENT OF STATE
WASHINGTON, D.C. 20520
March 17, 1983

Mr. Randy Miller
Executive Director
Department of Revenue
State of Florida
Tallahassee, Fla. 23201

Dear Mr. Miller:

I am writing to you to express the Department of State's concern regarding the recent enactment of a state tax on aviation fuel. In your letter to me of October 25, 1982, you indicated that the State of Florida ". . . recognized the importance of foreign airlines many years ago . . . and that the generous tax advantages allowed them have not changed."

Therefore, we were surprised and distressed to hear that the State of Florida plans to impose a 5% tax on aviation fuel, effective April 1, 1983. I understand the tax is to be applied to all aviation fuel sold and not only to fuel consumed in Florida, as had previously been the case. If imposed, this tax will cause serious foreign relations problems unless provision is made to exclude foreign airlines. It may be possible, for example, to provide for an exemption based on reciprocity whereby foreign airlines would be exempted from the tax if U.S. airlines operating to the foreign airline's home country are also exempted from similar taxes.

We would appreciate any further information you can give us concerning this new tax and for your comments on my suggestion to avoid the foreign relations difficulties.

Sincerely,
MATTHEW V. SCOCOZZA
Deputy Assistant Secretary for
Transportation and Telecommunication